

Tribal Shellfish Resource Management

Introduction

Shellfish have been a mainstay of western Washington Indian tribes for thousands of years. Clams, crab, oysters, shrimp, and many other species were readily available for harvest year 'round, and the relative ease with which large amounts could be harvested, cured, and stored for later consumption made shellfish an important source of nutrition – nearly as important as salmon.

Shellfish remain important for economic, subsistence, and ceremonial purposes. The rapid decline of many western Washington salmon stocks, due in large part to habitat loss from the region's burgeoning human population, has pushed shellfish to the forefront of many tribal economies.

Tribes have used shellfish in trade with the non-Indian population since the first white settlers came into the region nearly 150 years ago. Newspaper accounts from the Washington Territory's early days tell of settlers buying and trading fresh shellfish with Indians. Today, shellfish harvested by members of western Washington Indian tribes is highly sought after throughout the United States and Asia. Tribal representatives have made many business trips to China and other Pacific Rim nations where shellfish harvested from the Pacific

Northwest's cool waters – in particular, geoduck – is in great demand. Trade with Far East nations, hampered recently by the Asian economic crisis, is of heightened importance as the tribes struggle to achieve financial security through a natural resources-based economy.

The tribes have two distinct types of shellfish harvests – commercial, and ceremonial and subsistence.

Commercial harvests are fisheries for profit. Shellfish harvested during a commercial fishery is sold to licensed shellfish buyers who in turn either sell shellfish directly to the public or to other commercial entities – such as a wholesaler, restaurant, or other distributor. Tribes collect taxes from tribal members who sell shellfish. Those taxes are returned to the tribal programs to help pay for natural resource management.



Marcus George, Lummi, hauls a morning's harvest of manila clams from the Lummi Nation's sea ponds.

Ceremonial and subsistence harvests are intended for tribal use only. Shellfish has a central role in many tribal gatherings — from naming ceremonies and funerals, to elder honorings and the unveiling of a new story pole. All of these events feature clams and oysters steamed over a bed of white-hot rocks, or horse clams cooked on sticks over an alder fire.

Tribal Treaty Shellfish Rights

As with salmon, the tribes' guarantees to harvest shellfish lie within a series of treaties signed with representatives of the federal government in the mid-1850s. Language pertaining to tribal shellfish harvesting is included in this section:

“The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purposes of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.”

— *Treaty of Point No Point,*
Jan. 26, 1855

In exchange for the peaceful relinquishment of what is today most of western Washington, the tribes reserved the right to continue to harvest finfish and shellfish from all of their usual and accustomed grounds and stations. The tribes were specifically excluded from harvesting shellfish from areas “staked or cultivated” by non-Indian citizens.

The tribes exercised their treaty rights for decades following treaty signing, and in fact dominated the shellfish harvest through the turn of the century. Clamming remained dominated by the tribes into the 1920s. But as land continued to be purchased by white settlers, “no trespassing” signs began appearing on the gravelly beaches from Bellingham to Shelton. The tribes were slowly excluded from their traditional shellfish and finfish harvest areas.

Tribal efforts to have the federal government’s treaty promises kept began at the beginning of this century. The United States Supreme Court ruled in a case, *U.S. v. Winans*, that where a treaty reserves the right to fish at all usual and accustomed places, the state may not preclude access to those places.

More than half a century later, the tribes were again readying for a court battle, fed up with harassment, beatings, thefts of fishing gear, and having law enforcement look the other way. The United States government in 1970 filed a case on behalf of several western Washington tribes against the State of Washington. In 1974, U.S. District Court Judge George Boldt ruled the tribes had reserved the right to half of the harvestable salmon and steelhead in western Washington. The “Boldt Decision,” as it has become known, was upheld by the U.S. Supreme Court in 1979 and the tribes had once again attained their position as co-managers of salmon and steelhead.

The tribes became responsible for establishing fishing seasons, setting harvest limits, and enforcing tribal fisheries. Professional biological staffs, enforcement officers, and managerial staff were assembled to ensure orderly, biologically-sound fisheries would occur. Since the late 1970s, tribal and state fisheries staff have worked together to develop comprehensive fisheries regimes that ensure both harvest opportunity for Indian and non-

Indian alike, while preserving the resource for generations to come.

This new atmosphere of cooperative natural resources management gave the tribes hope that their treaty-reserved rights to shellfish harvest and management could be restored. Talks between the tribes and the state began in the mid-1980s, but were unsuccessful. In May 1989 the tribes again were forced to file suit in federal court to have treaty rights restored – this time for shellfish. Years of additional negotiations between the tribes and the state were unsuccessful, and the issue went to trial in May 1994.

The Rafeedie Decision And Implementation Plan

Federal District Court Judge Edward Rafeedie, a conservative Reagan Administration appointee from southern California, heard almost three weeks of testimony from tribal elders, biologists, historians, treaty experts, as well as testimony from private property owners, non-Indian commercial shellfish growers, state employees, and others during the trial in Seattle.

Tribal elders testified that knowledge of the different shellfish species, as well as where and when different types were harvested, were handed down from generation to generation. They told the court how their parents taught them to harvest and prepare clams, oysters, squid, octopus, barnacles, and other shellfish

for both immediate and future use. Shellfish was always available, and always free.

“We never had to buy food. We got it off the beach. It was plentiful,” said Bea Charles, a Lower Elwha Klallam tribal elder who testified at the trial.

The elders’ testimony was followed by tribal shellfish biologists and fishery managers who testified about current harvest management activities, including all of the management planning that occurs prior to a shellfish harvest, as well as monitoring programs in place to ensure harvests are properly conducted.

As with the court battle to have their rights to salmon harvest and management restored, the tribes’ arguments in the shellfish trial centered around the Stevens Treaties – specifically what the treaty language meant at the time they were signed.

Rafeedie’s ruling followed in the footsteps of the Boldt Decision. The judge ruled that the treaties’ “in common” language meant that the tribes had reserved harvest rights. In the case of shellfish, the tribes reserved the right to harvest up to half of all shellfish from all of the usual and accustomed places, except those places “staked or cultivated” by citizens. In other words, the tribes could continue to harvest shellfish from all of the areas that they always had, except from beaches that had no shellfish beds and were specifically set aside for non-Indian shellfish cultivation purposes.

“... In interpreting the shellfish proviso, the court must focus on what the Indians intended: The record unequivocally reflects the Indians’ insistence on reserving the right to fish as they always had, and the record is devoid of any objections or concern over their exclusion from ancient fisheries,” Rafeedie wrote in his December 1994 decision.

“A treaty is not a grant of rights to the Indians, but a grant of rights from them,” the judge wrote, adding that the United States government made a solemn promise to the tribes in the treaties that they would have a permanent right to fish as they always had.

“This right was promised as a sacred entitlement, one which the United States had a moral obligation to protect. The court may not rewrite the treaties or interpret the treaties in a way contrary to settled law simply to avoid or minimize hardship to the public or to the interveners (private property owners and commercial shellfish growers).”

As a result of Rafeedie’s ruling, all public and private tidelands within the case area are subject to treaty harvest, except for shellfish contained in artificially created beds. Rafeedie’s decision requires tribes planning to harvest shellfish from private beaches to follow many time, place, and manner harvest restrictions.

Dispute Resolution

Rafeedie’s detailed implementation plan established a dispute resolution process through which any group could dispute any other group’s harvest plans. Disputes will be heard by a special master that will be named by the court.

The Appeals Process

Each party to the court case appealed various portions of Rafeedie’s ruling, and the U.S. Court of Appeals heard all of the arguments in a May 1997 hearing. The tribes and United States argued that Rafeedie’s limitations to accessing private tidelands along with his definition of cultivated shellfish beds denied the tribes access to too many shellfish beds. The tribes also argued that Judge Rafeedie’s requirement that the tribes primarily use water access to reach harvest sites on private tidelands would jeopardize the safety of tribal harvesters. Rafeedie’s definition of a “natural bed” was also challenged by the tribes.

In a Sept. 25, 1998 ruling, the U.S. 9th Circuit Court of Appeals let stand Rafeedie’s ruling about treaty interpretation which the defendants had appealed. The 9th Circuit changed several portions of the implementation plan that the United States and tribes had appealed.

The appellate court denied appeals for a rehearing from the State of Washington and private property owners. The court also denied the tribes' petition to change the decision about natural clam beds beneath growers' cultivated oyster beds, but added language that if the growers acted inappropriately, the tribes could seek relief in federal court.

There is one more possible appeal in the shellfish court case — the U.S. Supreme Court. Talks are continuing between the tribes and other parties to the court case.

The Era of Cooperation

Although the potential exists for Supreme Court review of Rafeedie's decision, the tribes have moved forward with management of their treaty-reserved resources. Tribal shellfish managers have developed harvest management and supplementation plans. Harvest data is collected and shared with other tribes and the state co-managers.

Examples of cooperative management can be found along the shellfish-laden beaches of Hood Canal, where treaty tribes have struck harvest agreements with a private beach owner and the U.S. Navy.

In February 1997 a Hood Canal tidelands owner signed a shellfish management agreement with the Point No Point Treaty Council (PNPTC). The agreement included provisions for popula-

tion surveys, harvest planning, and potential cooperative shellfish enhancement activities.

The first harvest occurred in August of that year when Skokomish tribal members harvested about 100 dozen oysters from the tideland owner's property under the supervision of the tribe's fisheries manager and the tideland owner's family. The oysters were bound for a picnic celebration to honor Skokomish's elders.

One year later, the PNPTC tribes returned to a different Hood Canal beach that had been off-limits to them for nearly half a century. The beach lies within the U.S. Navy's submarine base at Bangor, and has seen only sporadic shellfish harvesting for several decades. The tribes and Navy developed a management agreement for sharing shellfish resources at Bangor.

The tribes have exclusive management control of the beach and have developed a management plan that includes enhancement projects.

Public Health

Shellfish growing areas are routinely surveyed for current or potential pollution impacts, and are classified based on the survey information. No shellfish harvesting is allowed on beaches that have not been certified by the tribes and the Washington Department of Health.

The tribes and state have developed a cooperative program designed to protect the shellfish consuming public from contaminated shellfish. The shellfish sanitation agreement, which was approved by Judge Rafeedie, ensures that all shellfish harvested within the State of Washington meets federal public health standards.

Conclusion

The future of western Washington's thriving shellfish resource relies upon the continuation of existing cooperative management between the tribes and their state counterparts. The tribes' longstanding conservation ethic encourages everyone to take only what is needed, and to protect the environment so that all may share in this and other natural resources for generations to come.

For More Information

For more information about the natural resource management activities of the treaty Indian tribes in western Washington, contact the Northwest Indian Fisheries Commission, 6730 Martin Way E., Olympia, WA., 98516; or call (360) 438-1180. The NWIFC home page is available on the World Wide Web at www.nwifc.wa.gov.